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No. 79-1751

IN THE

Supreme Court of the United States

October Term, 1979

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

PAGE

Cases:

Jenkins v. Anderson, 100 S.Ct. 2124 (June 10, 1980) 2, 3–4

People v. Savage, —— N.Y.2d ——, No. 300 (July 3, 1980) 1, 4

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In a supplemental brief in opposition to the petition for certiorari, respondent contends again that the decision below rested on an independent state ground. Of course, this contention is directly contradicted by the amended remittitur in this case. In a desperate attempt to avoid review, by seeking to persuade this Court to disregard the unequivocal meaning of the amended remittitur, respondent now argues that the concurring and dissenting opinions in *People* v. *Savage,* —— N.Y.2d ——, No. 300 (July 3, 1980) show the decision in this case to rest on an independent state ground.

In *Savage* (a 5-2 decision), in an opinion by Judge Fuchsberg, the New York Court of Appeals held that if a defendant waives his right to remain silent and tells one story when he is arrested, and subsequently testifies to another story at trial, then he may be cross-examined regarding his failure to tell that same story at the time of his arrest. Notably, the majority opinion does not mention the instant case but instead relies extensively on *Jenkins* v. *Anderson,* 100 S.Ct. 2124 (June 10, 1980).

Perceiving the significance of *Jenkins,* both the concurring opinion by Chief Judge Cooke, and the dissenting opinion of Judge Gabrielli, joined by Judge Wachtler, state that the *Conyers* case rested on both the State and Federal Constitutions. These three judges along with Judge Fuchsberg, comprised the majority in *Conyers.* Respondent argues that it can be assumed that Judge Fuchsberg concurred in the view that *Conyers* was decided on state and federal grounds because he did not contest that interpretation when he authored the majority opinion in *Savage.* Respondent therefore reasons that the decision in *Conyers* rested on an independent state ground notwithstanding the amended remittitur.

Respondent's argument is unsound. That Judge Fuchsberg's majority opinion in *Savage* was silent on this issue does not lead rationally to the inference that he agreed with Judges Cooke, Gabrielli and Wachtler regarding their interpretation of the *Conyers* decision. This is so because it was unnecessary for the majority in *Savage* to discuss *Conyers.* Inasmuch as *Savage* concerned a defendant who made a statement when he was arrested, whereas *Conyers* concerned a defendant who did not speak, the majority in

Savage was evidently of the view that the holding in *Conyers* was inapplicable. Hence, there was no need to respond to the dissenting and concurring judges' discussion of *Conyers*. Furthermore, it is fundamental that a majority opinion should not be interpreted in light of the rhetorical comments of the minority, which frequently overstate the majority view. Put simply, there was no reason for Judge Fuchsberg to respond to Judges Cooke, Gabrielli and Wachtler when he authored *Savage*.

Neither can the clear meaning of the amended remittitur be defeated by the argument that three of the four judges who joined the majority in *Conyers* have expressed subsequently their view that *Conyers* rested on an independent state ground. It is the practice of the New York Court of Appeals for the entire court, not just the members of the majority, to vote on motions to amend a remittitur. Thus, even assuming that when they voted on the remittitur motion in *Conyers*, Chief Judge Cooke and Judges Gabrielli and Wachtler had the same belief expressed in their opinions in *Savage*, it becomes clear that Judge Fuchsberg was part of the majority which voted to amend the remittitur in *Conyers*.*

Respondent's newest jurisdictional argument to avoid a determination on the merits is understandable in view of this Court's recent holding in *Jenkins* v. *Anderson*, 100 S.Ct.

* That members of the minority vote on motions to amend the remittitur is jurisprudentially sound. Were it otherwise, a minority of the state court could deprive this Court of jurisdiction based upon its view that a case had been decided on State and Federal Constitutional grounds, even though a majority of the court believed not only that the case was decided on Federal Constitutional grounds, but also that its decision had no independent state basis.

2124 *supra,* that the Federal Constitution is not violated by impeaching a defendant with his pre-arrest failure to exculpate himself where he was not given *Miranda* warnings and did not otherwise specifically indicate that he was relying on his right to remain silent. True, *Jenkins* concerned the silence of a defendant who was not in custody. However, as noted by even the dissenters in *Savage,* the language in *Jenkins* would seem to apply with equal force to the silence of a defendant who, like Conyers, was in custody. (*People* v. *Savage,* No. 300, dissenting slip op. at 3, fn. 1). Thus, to avoid any further review and the inevitable application of *Jenkins* to this case, respondent has taken an unsupportable position which is directly contradicted by the amended remittitur.

The decisions in *Jenkins* and *Savage* might suggest that this case should be remanded to the New York Court of Appeals rather than reviewed by this Court. However, as noted in our petition, this case presents the last of three recurring factual situations concerning an accused's silence and subsequent cross-examination about that silence. (*See* Petition p. 10). Consequently, the case should be heard on the merits.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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